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In The

Supreme Court of the United States

October Term, 1972

No.

CONSOLIDATION COAL COMPANY, a corporation,

vs.

LAWRENCE W. BAILEY, individually and as the representative party of all other persons in the class similarly situated; THE TOWNSHIP OF PERRY, Greene County, Pennsylvania; FLOYD BIRCH, E. D. LEMLEY and L. CARL PHILLIPS, as Supervisors, constituting the Board of Supervisors of said Perry Township; ESTELLA JOHN as Occupational Privilege Tax Collector of said Perry Township; and DON WILKINSON as Earned Income Tax Collector for said Perry Township

LAWRENCE W. BAILEY, individually and as the representative party of all other persons in the class similarly situated,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Lawrence W. Bailey, individually and as the representative party of all other persons in the class similarly situated, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on September 27, 1972.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit, reprinted in Appendix A to this Petition, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 27 1972, and is reprinted in Appendix B to this Petition. This Court's jurisdiction is invoked under 28 USC § 1254 (1).

QUESTION PRESENTED

In this case, initiated under the Federal Interpleader Statute, 28 U.S.C., Section 1335, the interpleaded nonresident miners, petitioners in this action, raise four constitutional issues; (1) whether the Commonwealth of Pennsylvania, through its political subdivisions, is without a jurisdictional base to extend its taxing powers into a West Virginia coal mine operated and regulated exclusively under the laws of West Virginia; (2) whether the tax ordinances of Perry Township, Pennsylvania infringe the Fourteenth Amendment to the United States Constitution in that they deprived the nonresident taxpayers of property without any corresponding benefits; (3) whether the taxing ordinances of Perry Township place an undue burden on interstate commerce by taxing nonresident miners' gross income and by charging the nonresident miners for the privilege of working in an interstate coal mine, thus duplicating taxes levied by the State of West Virginia; and (4) whether the Local Tax Enabling Act of 1965, December 31, P.L. 1257, Section 511, as amended which allows a mandatory tax credit for taxes paid to another state or political subdivision by residents of the Commonwealth but contingent the

credit to nonresidents upon the happening of two events, denies to some nonresidents the same uniformity, equal protection and privileges and immunities as other nonresidents and all residents of the taxing state.

The Court of Appeals below answered all the questions presented in the negative. Of primary importance is the conclusion of the Court of Appeals as to the fourth question. The thrust of the lower court's decision is that since local governmental units could not enact income tax in West Virginia no real issue regarding the privileges and immunities clause was presented.

The Court's disposition of these issues will substantially effect the future of countless interstate coal mines and their employees throughout Appalachia who have been or are being placed in similar circumstances as the nonresident petitioners.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The pertinent provisions of Article 1, Section 8 of the United States Constitution, commonly referred to as the "Commerce Clause," are as follows:

> "The Congress shall have the Power to Regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes."

2. The pertinent provisions of Article IV, Section 2 of the United States Constitution are as follows:

> "No Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in several States."

3. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. The pertinent provisions of Article 8, Section 1 to the Constitution of the Commonwealth of Pennsylvania are as follows:

"All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

5. The pertinent provisions of Title 53, Section 6914 (Purdon's Penna. Statutes Annotated, West 1971 Suppl.):

Payment of tax to other political subdivisions or states as credit or deduction: withholding tax.

Payment of any tax to any political subdivision pursuant to an ordinance or resolution passed or adopted prior to the effective date of this act shall be credited to and allowed as a deduction from the liability of taxpayers for any like tax respectively on salaries, wages, commissions, other compensation or on net profits of businesses, professions or other activities and for any income tax imposed by any other political subdivision of this Commonwealth under the authority of this act.

Payment of any tax on salaries, wages, commissions, other compensation or on net profits of business, professions or other activities to a political subdivision by residents thereof pursuant to an ordinance or resolution passed or adopted under the authority of this act shall be credited to and allowed as a deduction from the

liability of such persons for any other like tax respectively on salaries, wages, commissions, other compensation or on net profits of businesses, professions or other activities imposed by any other political subdivision of this Commonwealth under the authority of this act.

Payment of any tax on income to any political subdivision by residents thereof purusant to an ordinance or resolution passed or adopted under the authority of this act shall, to the extent that such income include salaries, wages, commissions, other compensation or net profits of businesses, professions or other activities, but in such proportion as hereinafter set forth, be credited to and allowed as a deduction from the liability of such persons for any other tax on salaries, wages, commissions, other compensation or on net profits of businesses, professions, or other activities imposed by any other political subdivision of this Commonwealth under the authority of this act.

Payment of any tax on income to any state or to any political subdivision thereof by residents thereof, pursuant to any State of local law, may at the discretion of the Pennsylvania political subdivision imposing such tax, to the extent that such income includes salaries, wages, commissions, or other compensation or net profits of businesses, professions, or other activities but in such proportions as hereinafter set forth, be credited to and allowed as a deduction from the liability of such person for any other tax of salaries, wages, commissions, other compensation or net profits of businesses, professions or other activities imposed by any political subdivision of this Commonwealth under the authority of this act, if residents of the political subdivision in Pennsylvania receive credits and deductions of a similar kind to a like degree from the tax on income imposed by the other state or political subdivision thereof.

Payment of any tax on income to any State other than Pennsylvania or any political subdivision located outside the boundaries of this Commonwealth, by residents of a political subdivision located in Pennsylvania shall to the extent that such income includes salaries, wages, commissions, or other compensation or net profits of businesses, professions or other activities but in such proportions as hereinafter set forth, be credited to and allowed as a deduction from the liability of such person for any other tax on salaries, wages, commissions, other compensation or net profits of businesses, professions or other activities imposed by any political subdivision of this Commonwealth under the authority of this act.

Where a credit or a deduction is allowable in any of the several cases hereinabove provided, it shall be allowed in proportion to the concurrent periods for which taxes are imposed by the other state or respective political subdivisions, but not in excess of the amount previously paid for a concurrent period.

1965, Dec. 31, P. L. 1257, Section 14, as amended 1967, July 7, P. L. 171, Section 1.

6. The pertinent provisions of the West Virginia Code, Chapter 11 Article 21, Section 20 (Michie 1966) provides:

(a) General—A resident shall be allowed a credit against the tax otherwise due under this article for any income tax imposed for the taxable year by another state of the United States or by the District of Columbia, upon income derived both therefrom and subject to tax under the article.

STATEMENT OF THE CASE

This case originated as an interpleader action in the Court below. The plaintiff, Consolidation Coal Company, initiated the suit being the holder of a fund that is claimed by two contending parties. The major vexing aspect of this suit arises from the fact that the fund which Consolidation holds is composed of tax monies which it has withheld from the pay of their employees. The one claimant to the fund is the tax collectors. The other is a class of employees of Consolidation who asserts that the tax cannot be imposed upon the class constitutionally.

The tax collectors represent Perry Township in Greene County, Pennsylvania. The class of taxpayers resisting the tax are all residents of West Virginia who work in a coal mine and must enter the coal mine through a portal in Pennsylvania.

Bits and pieces of litigation preceded the present proceeding commenced in the Federal District Court for the Western District of Pennsylvania. The first action was started on behalf of the class of West Virginia miners as an equity action for an injunction in the Circuit Court for Monongalia County, West Virginia. That Court issued an injunction against Consolidation Coal ordering it not to pay over the monies withheld from the nonresident miners.

Consolidation then sought an interpleader action in the Federal District Court for relief in the Northern District of West Virginia. That action was dismissed with the Court not going to the merits of the controversy. Then Perry Township brought suit in a Pennsylvania Court in what was purported to be a class action against the West Virginia miners and Consolidation

Coal Company. In what the class maintained was at best an abortive attempt to bind it by a judgment, a Pennsylvania State Court, the Common Pleas Court of Greene County, entered judgment against the class and the Consolidation Coal Company ordering the money to be paid over to the Township. Caught in the crossfire between a West Virginia State Court injunction and a Pennsylvania State Court judgment for money, Consolidation Coal again turned to the federal court for interpleader action.

At this juncture, it should be noted that the class here involved has not been a highly structured or well organized group. It organized enough to make the first move in the Circuit Court of Monongalia County, West Virginia. The class then went unrepresented until the present action in interpleader before the lower court.

In the interpleader action, Consolidation Coal Company, successfully asserting its right to interpleader relief named the class and Township as defendants. The miners agreed that it was a class that could be treated as such under Rule 23 of the Federal Rules of Civil Procedure and asserted a positive claim to the fund as did Perry Township and the tax collectors. The lower court after receiving guidance from this court granted the interpleader and decided the case on the merits between the two competing claimants. That decision was totally favorable to Perry Township and the Tax Collectors thereby making this appeal of the miners possible.

Consolidation Coal Company is a Delaware Corporation with offices in Pittsburgh, Pennsylvania and Morgantown, West Virginia. Consolidation is engaged in the mining of coal in Monongalia County, West Virginia and in that connection owns and operates the

Humphrey Mine wherein the appellant-miners (hereinafter referred to as the nonresident miners) are employed. The Humphrey Mine is somewhat unique in that part of the mine extends geographically into the subsurface of the Commonwealth of Pennsylvania. Originally all portals and ventilation shafts were located in West Virginia but in order to save time a new portal to the Humphrey Mine was constructed in Mt. Morris, Pennsylvania. Presently, the coal is extracted from under Mt. Morris, Pennsylvania but carried into and produced in West Virginia. The location of this new portal allowed Consolidation to save wasted manpower hours since the location of the new portal was closer to the actual situs of work. A significant portion of the nonresident miners (335),[1] who principally are involved with the extraction of coal, enter the Humphrey Mine through the Mt. Morris portal. No coal is produced from this portal. Its exclusive use is for the entrance of the miners and for ventilation purposes. All coal produced in the mine is brought to the surface, loaded and processed in West Virginia. With respect to travel time, the time lapse between the West Virginia border and the Mt. Morris portal is approximately three minutes. Pursuant to the National Bituminous Coal Wage Agreement of 1968, a bathhouse is provided for the miners to change clothes before they enter the mine. No charge is assessed for the use of the bathhouse and

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1. Originally, it was maintained by the nonresident miners that the Township's tax ordinances applied only to those miners who portal or work in the portal house at Mt. Morris. However, before the lower court, the legal representatives of the Township claimed that it was to apply to all those working in the Humphrey Mine since all employees at some time during the day travel subsurface under Mt. Morris. There is a number of miners who enter the Humphrey Mine at the portal in Monongalia County, West Virginia who were not affected by the Township's taxes until the day of trial in the lower court.

approximately five minutes are spent there before the miners enter the portal elevator to begin work.[2]

Pursuant to the Local Tax Enabling Act of 1965, Dec. 31, P. L. 1257, Section 511 as amended, Perry Township (i.e. "Township") enacted two taxes: (1) an Occupational Privilege Tax of $10.00 per man for both residents and nonresidents of Pennsylvania and (2) a 1% Earned Income Tax on gross wages, salaries, commissions and other compensation payable by nonresidents only. Upon proper notice,[3] Consolidation was directed by the Township to withhold the above mentioned taxes from all the miners' wages. The Earned

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2. The pay period for the nonresident miners does not begin until there is an entrance on the portal elevator. The National Bituminous Coal Wage Agreement of 1968 provides as follows:

Wages and Hours.

(a) For all inside employees a work day of eight hours from portal to portal which means collar to collar or bank to bank, is established including a staggered thirty minutes for lunch, and without any intermission or suspension of operation throughout the day, (page 18).

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3. These two letters were sent to Consolidation Coal on March 17, 1969.

Christopher Coal Company Division
Consolidation Coal Company
P. O. Box 100
Osage, West Virginia 26543
Dear Sirs:

You are hereby notified that the Occupational Privilege Tax Ordinance enacted and ordained by the Township of Perry, Greene County, Pennsylvania, levies a tax in the amount of $10.00 on the privilege of engaging in an occupation within the Township of Perry.

You are, therefore, requested and authorized to deduct this tax from the pay of each of your employees who work at your Humphrey Portal located at Mt. Morris, Perry Township, Pennsylvania and from each employee who enters your Humphrey Mine at the above portal. This tax is due and payable on April 30, 1969.

Very Truly Yours.
Estella John
Tax Collector
Perry Township, Greene County,
Pennsylvania

Income Tax is levied against all income of the miners during the year, including vacation pay. None of the money collected from the resident Pennsylvania miners has been held by Consolidation Coal. To date, none of the tax fund accumulated from the wages of the resident West Virginia miners has been paid to the Township. The tax fund totals approximately $88,000 and it is the final possession of this fund that has caused the present lawsuit.

Petitioners Lawrence W. Bailey (i.e. "Bailey"), a resident and taxpayer of West Virginia is joined individually and as the representative party of all other members of the class of miners similarly situated (i.e. 335 West Virginia miners who use the Mt. Morris portal and are subject to the Occupational and the Earned Income Taxes). All of the miners represented by "Bailey" are residents and taxpayers of West Virginia

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Christopher Coal Company
P. O. Box 100
Osage, West Virginia
Gentlemen:

As of January 15, 1969, all persons in your employ who work or portal at the Mt. Morris portal in Perry Township Greene County, Pennsylvania became subject to a one percent (1%) earned income tax. There will be no exceptions to this liability unless specifically specified in writing by this office.

All employees, regardless of the state or municipality of residence, are liable for this tax. If you have not as yet started to withhold this tax from your employees wages it will be incumbent upon you to withhold the tax retroactively on all income earned or paid on or after January 15, 1969. This does not in any way effect the income tax liability of residents of Central Greene County School District from whom you were previously withholding.

The employee's name, city, borough, Township, and/or state of residence should be included on each report so that tax monies withheld can be transmitted to the proper district. Should you have any further questions regarding this change please contact the writer.

Very Truly Yours,
Don Wilkinson
Income Tax Administrator
Township of Perry

and are claimants to the tax fund. All the miners are members of District 31, United Mine Workers, located at Fairmont, West Virginia and the jurisdiction of the United Mine Workers extends to West Virginia only. The miners receive no benefits from the Commonwealth of Pennsylvania or its political subdivision such as workmen's compensation, unemployment, black lung compensation, and other benefits and privileges given to miners who work under the jurisdiction of the State of Pennsylvania Department of Mineral Resources.

Respondents Perry Township is a Pennsylvania Township. Floyd Birch, E. D. Lemley and L. Carl Phillips are Supervisors of Perry Township; Estella John is the Occupational Privilege Tax Collector for "Township"; Don Wilkinson is the Earned Income Tax Collector for the "Township." All of the aforesaid persons are Pennsylvania residents and claimants to the tax fund.

Except for federal regulations the Humphrey Mine is run exclusively under the laws of West Virginia and the regulations of the West Virginia Department of Mines. Until the present suit, West Virginia exercised exclusive taxing jurisdiction over all the property in the Humphrey Mine. In fact the State of West Virginia levies a personal property tax on all personal property used in the mine. Similarly the State of West Virginia levies a business and occupation tax on Consolidation Coal based on the amount of coal produced from the Humphrey Mine.

There exists an informal understanding between West Virginia and Pennsylvania which is enforced by both States, that provides that the law of the state in which the original entrance of the mine is opened governs the conduct of the mine.

REASONS FOR THE WRIT

The Circuit Court of Appeals reduced the issues posed simply to whether the Commonwealth of Pennsylvania could levy an income tax on the nonresident miners. However, an ignored issue concerns which jurisdiction—West Virginia or Pennsylvania—has the constitutional power to tax mining operations that are conducted geographically under the surface of the Commonwealth of Pennsylvania. Significantly, the issue before this Court is whether the Commonwealth has rendered itself constitutionally impotent to reach through taxation the nonresident miners. What is being suggested is whether the abandonment of control of the mining operations by Pennsylvania has brought its power to tax within the prohibitions enunciated by this Court in **Connecticut General Life Insurance Co. v. Johnson, Treasurer of California,** 303 U. S. 77 (1938) and **Wisconsin v. J. C. Penney Co.,** 311 U. S. 435 1 30 A. L. R. 1229 (1940). The decision of the Court below conflicts with the aforesaid decisions of this Court.

As an important subsidiary issue, the constitutionality of the pertinent tax credit provision pertaining to nonresidents is challenged. Petitioners contend that this provision results in a heavier tax burden for the nonresident miners while at the same time they are afforded less benefits and protection. Such a result is a denial of equal protection and offends the privilege and imunities clause. The decision below which did not accurately speak to the issue raised will have a deleterious effect on the protection of the substantive constitutional rights of nonresident miners.

I. The Decision Below Conflicts With Decisions of This Court

Certiorari should be granted because the holding of the Court below conflicts with a long line of substantial precedent cases from this Court.

The thrust of the lower court's decision was that the nonresident miners' actual presence in Pennsylvania gave rise to taxing obligations. The lower court, thereby, attempted to adopt the proposition that due process will not be violated if the nonresidents, by engaging in income producing activities in Pennsylvania, have enjoyed the benefits and protections of the laws of the State. In such a case, as it will be later discussed, the nonresidents are justifiably burdened with obligations imposed by the taxing jurisdiction, one of which includes the duty to pay taxes. However, Bailey and the class he represents pose the perfect example where it can hardly be said that the laws of Pennsylvania afforded them any benefit or privilege sufficiently substantial to justify a correlative obligation to pay taxes. It is doubtful whether the relative remote benefit the nonresident miners derived from the use of the territory is the sort of "activity" or "contacts" envisioned by the United States Supreme Court in **Hanson v. Denskla,** 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 2d 1283 (1958). In **Hanson,** the court held that because the defendant exercised no "real" privilege in the state, there was no corresponding duty giving rise to personam jurisdiction. The activities of the nonresident miners which create an obligation to pay taxes certainly cannot be based on their employment contract which arose and is enforced in West Virginia. Their contract clearly has no "substantial contact" with Pennsylvania and thus would fail under the test in **McGee v. International**

Life Ins. Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed. 2d 223 (1957) that held only if a defendant has "substantial contact" with the state would there be a sufficient invocation of the benefits and protections of the state creating corresponding obligations. The only other "activity" that is connected with the income producing activities that the court could possibly be using to satisfy the **Hanson** test is mere presence of the nonresident miners in Pennsylvania. This contention that "presence" automatically equals "activity" has often been expressly rejected as being contrary to the doctrine of **Hanson** and **International Shoe.** See, e.g., **Da Silveria v. Westphalia Separator Co.**, 248 Cal. App. 2d 789, 57 Cal. Rptr. 62 (1967); **O'Brien v. Comstock Foods, Inc.**, 123 Vt. 461, 194 A. 2d 568 (1963).

An important factor bearing directly on the issue of jurisdiction is the existence of an informal agreement between the Commonwealth of Pennsylvania and the State of West Virginia.[4] This agreement allows the State of West Virginia to exercise jurisdiction over the income producing activities of the miners. It is somewhat of an anomaly to say that "territorially" the mine is located in Pennsylvania since the features usually controlling in determining governmental territory are absent. At the very least, this agreement

4. There is an informal agreement bearing upon jurisdiction of mines that cross state boundaries between the State of West Virginia and the Commonwealth of Pennsylvania. This agreement is recognized and acted upon by the authorities of these states who are charged with the enforcement of State mining laws. This agreement provides that the State where the original opening of a mine occurs asserts jurisdiction over the entire mine, even though mining operations may proceed under the other state so long as the company that is conducting such mining operations is present and doing business in the State of the original opening. Under this agreement, and consequently since the mine originally opened in West Virginia, it is under the jurisdiction of West Virginia mining laws, even though mining operations occur under the Commonwealth of Pennsylvania. **Additional Findings of Fact, No. 5.**

should be construed as limiting the Commonwealth's jurisdiction to tax the miners since the very thing it has ceded to West Virginia forms the source of the income producing activity.

The nonresident miners allege that the Township of Perry had neither jurisdiction of activities giving rise to their income nor justification to levy a tax. In this regard consider these pertinent facts:

(a) the taxpayers are resident of West Virginia;
(b) they pay income tax to the State of West Virginia;
(c) they work in a West Virginia mine;
(d) they earn no income except that made in a West Virginia mine;
(e) they receive the following benefits from the State of West Virginia only: (1) workmen's compensation, (2) unemployment compensation, and (3) black lung compensation;
(f) the mine is run exclusively under the laws of the State of West Virginia and the rules and regulations promulgated by the West Virginia Department of Mines;
(g) all health, safety laws, except federal, are made and enforced by the State of West Virginia;
(h) necessarily, judicial cases arising from this mine have been filed in the State Courts of West Virginia;
(i) the employment contracts are made and enforced under the laws of West Virginia.

In deciding whether there is jurisdiction and justification to levy a tax, the United States Supreme Court has articulated two separate but somewhat related tests[5] (1) **Control** over the subject matter taxed, and

5. A third test, the "integration" theory, has received no judicial endorsement. See Arthur Leon Harding, **Double Taxation of Property and Income** (Cambrigde, Harvard University Press, 1933). Mr. Harding believes that the right to tax rests upon the integration of the subject

(2) **Protection afforded**—whether the state has given some benefits that it can ask for something in return.

The Supreme Court in the case of **Connecticut General Life Insurance Co. v. Johnson, Treasurer of California,** 303 U.S. 77 (1938) held that:

> The limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon the objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitional prohibition we look to the state's power to control objects of the tax as marking the boundaries of the power to lay it. **Hence it is that a state which controls the property and activities within its boundaries admitted to do business there may tax them.**

The performance of the activities giving rise to the miners' income is not contingent or dependent upon any privilege of authority granted by Perry Township or the Commonwealth of Pennsylvania. Neither the Commonwealth nor Perry Township has attempted to exercise its control over the mine to any extent. Both refuse to send its mining inspectors, its police inspectors or its fire inspectors into the Humphrey Mine to insure

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into the economy of the state in question. The state does not acquire tax jurisdiction merely by providing some protection to property or persons or because it can exercise control over them. For example, goods traveling through a state are protected by that state and, to a certain extent, are under the control of that state and could be taxed according to either the benefit theory or the control theory. Such goods are not, however, integrated into the economic organism of the state in Harding's use of the term and are not subject to taxation according to the integration theory. The determination of which state has jurisdiction to tax income is made by identifying the nature of the individual's contribution to the economic mechanism and then determining which place the economic activity and the contribution is integrated.

that minimum standards of safety are maintained. Rather, it is submitted that the only control or attribute of sovereignty exercised over the income producing activities by the Commonwealth is that which is exercised over the income of the miners after it has been earned totally at the expense of the miners and the State of West Virginia.

The second and more popular theory that is used to decide the constitutionality of a tax is the "economic benefit" theory. It was announced by Justice Frankfurter in **Wisconsin v. J. C. Penney Co.**, 311 U.S. 435, 130 A.L.R. 1229 (1940):

> "Taxable event," "jurisdiction to tax," "business situs," "extraterritoriality," are all compendious ways of implying the importance of state power because state power has nothing on which to operate. These jags are not instruments of adjudication but statements of results in applying the sole constitutional test for a case like the present one. **That test is whether property was taken without due process of law, or, it paraphrased, whether the taxing power exerted by the state bears fiscal relations to protection, opportunities and benefits given by the state.** The simple but controlling question is whether the state has given anything for which it can ask a return.

Similarly, in **Ott v. Mississippi Barge Line**, 336 U.S. 169, 69 S.Ct. 432, 93 L.Ed. 585 (1949) the Court stated "so far as due process is concerned the only question is whether the tax in practical operation has relations to opportunities, benefits, or protection conferred or afforded by the taxing states." Accord. **National Bellas Hess v. Department of Revenue** 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed. 2d 505 (1967).

Uncontroverted facts affirmatively show that while the miners are engaged in their occupation they receive no benefits from the Commonwealth of Pennsylvania. The taxing authorities argue, however, that the situs of the portal and the bathhouse in Mt. Morris, Pennsylvania, the fact that the work is done under the surface of Mt. Morris and the fact that the miners exercise the privilege of using the highways to travel in and out of Pennsylvania are corresponding benefits capable of satisfying the due process requirement. However, we contend that these benefits are not directly related to employment with the exception of the mine being located in Mt. Morris, Pennsylvania. "Mere presence in transit or sojourn" does not satisfy the constitutional prerequisite for taxation purposes. **Miller Bros. Co. v. Maryland,** 347 U.S. 340, 74 S.Ct. 535, 98 L.Ed. 744 (1954). The appropriate tax for use of a highway is a toll tax. This burden is then shared equally among its users.[6] Clearly, the location of the mine is under the surface of Perry Township, but this fact is unimportant. Pennsylvania has ceded jurisdiction to West Virginia to control, protect and regulate that territory. The **Quid Pro Quo** is that Pennsylvania when similarly situated is offered the same rights.

The most significant argument of the taxing authorities centers around the location of the portal to the Humphrey Mine in Mt. Morris, Pennsylvania. This portal is the entrance to the Humphrey Mine and the facts reflect that the income period of each miner begins when he enters the portal elevator descending toward the situs of work. The amount of time spent

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6. Accord: **Hanover Fire Insurance Co. v. Harding,** 272 U. S. 494, 47 S. Ct. 179, 71 L. Ed. 372 (1926), which held that a statute resulting in inequality of burdens upon the rights of like character, denies equal protection.

daily on the portal elevator does not exceed ten minutes. The taxing authorities contend that this contact with the Commonwealth is a sufficient nexus for taxation purposes. The miners would concede that since "theoretically" some Pennsylvania police protection could be afforded the miners while they wait to enter the mine, the amount of income earned during that brief period is taxable. However, there is a total climax to such police protection once the elevator has begun its downward movement. The miners contend the fact that the coal is extracted from the subsurface of Perry Township is not significant since the taxing authorities argue that the tax is upon every miner who works in the Humphrey Mine, rather than having as a prerequisite the fact that they enter the Mt. Morris portal. Clearly, the Township has no right to tax the entire activities of an interstate mine.

The fact that cars of the miners are parked in a lot owned by their employer can be of no potential moment to the taxing authorities. Assuming that the miners' position regarding income earned in the mine is tenable then the mere fact that cars are parked in the taxing jurisdiction while income accrues in another does not give the former authority to tax income. It would be another proposition if the tax was labeled a parking tax.[7]

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7. Since the taxes are not designated as toll or parking taxes they cannot be collected under the guise of a "toll" or "parking" tax justification.

"It serves no purpose for the State Tax Commissioner to suggest that if, there were some intrastate commerce involved or if an appropriate tax were imposed as compensation for petitioner's use of the highways, the same sum of money as is at issue here might be collected lawfully from petitioner. Even though the financial burden on interstate commerce might be the same, the question whether a state may validly make interstate commerce pay its own way depends first of all upon the constitutional channel through which it attempts to do so." **Spector Motor Service v. O'Conner, supra,** at page 608.

Additionally, it is important to understand that there are "surface" benefits given to the miners. But there are no "subsurface" benefits. Crucially, all income is earned while under the surface of Mt. Morris. Probably to some degree the Commonwealth exercises some control over the surface operations of the Humphrey Mine. The Commonwealth, however, exercises no control to any extent over the subsurface activities of the Humphrey Mine.

The case is unusual since it is generally considered that to the extent a taxpayer exercises the privilege of working within a state, he enjoys the benefits and protections of the laws of that state during the course of his employment. Further, the exercise of the privilege of working within a state will presumptively give rise to obligations, and, so far as those obligations arise out of or are connected with the income producing activities within the state, an ordinance requiring a taxpayer to pay for that privilege, as other similarly situated taxpayers, is not a denial of due process. **International Shoe Co. v. Washington,** 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).[8] The facts of this case have sufficiently rebutted any presumption of obligations caused and benefits enjoyed. Rather, there is an insufficient connection between the income producing activities and benefits and protections afforded. The rule requiring "minimum" contacts with the state is as much qualitative as it is quantitative. See Brendt Lohr-Schmidt, **Developing Jurisdictional Standards for State Taxation of Multistate Corporate Net Income**; 22 Hasting

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8. The broad power of a state to tax nonresidents is based on the Supreme Court's determination that the Fourteenth Amendment does not prohibit such a tax so long as the income giving rise to the tax has a sufficient relation to the benefits and protections provided by the taxing state.

L. J. 1035 (1971). The Supreme Court in **Hanson v. Denckla,** 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 2d 1283 (1958), attempted to formulate a more definite test for determining exactly what conduct constitutes "minimum contacts:"

> The application of that rule (minimum contact) will vary with the quality and nature of the defendants' activity, but it is essential in every case that there be some act by which the defendant purposefully avails itself of the privilege of conducting **activities** within the forum state, **thus invoking the benefits and protections of its laws.** (Emphasis added.)

II. The Decision Below Will Have a Deleterious Effect on the Protection of the Substantive Constitutional Rights of Nonresident Miners in Appalachia

The lower court resolved the constitutional challenge to the Pennsylvania tax credit provision by providing as follows:

> Appellants also contend that the Pennsylvania Enabling Act deduction provision, 53 Pa. Stat. Ann. §6914 (Supp. 1972), is violative of the equal protection and privileges and immunities clauses of the United States Constitution because it provides that a Pennsylvania resident receives a credit for out-of-state income taxes he pays, whereas a nonresident is given such credit only if the state where he paid the tax has a reciprocal provision giving Pennsylvania residents a similar credit. This, appellants argue, subjects nonresidents to the risk of multiple taxation from which residents are protected. The risk to which they refer, however, is entirely hypothetical. Political subdivisions of West Virginia do not have the power to enact either a personal income tax or an earned income tax. W. Va. Code Ann., §§11-8-1 et seq., 11-21-1 et seq.

> (1966); and the state gives nonresidents a credit against the personal income tax imposed if the nonresident's home state has reciprocal provisions, §11-21-40, thereby meeting the Pennsylvania requirements for statutory credit. Since the class of miners before us has not been subjected to any discrimination we see no justifiable issue as to the effect of the Pennsylvania reciprocity provision.

It is apparent that the lower court based its decision entirely upon the fact that since political subdivisions in West Virginia do not have the power to levy an income tax, there is actually no risk of multiple taxation that would be relevant to the Local Tax Enabling Act of 1965. The lower court of appeals misconstrues the issue. West Virginia does have a **state** income tax purusant to which the petitioners pay to West Virginia a state income tax. West Virginia allows a tax credit against its taxes only if the tax paid outside of West Virginia is to a **state.** It does not apply if the tax is paid to a political subdivision.

The discrimination results from the section of the Pennsylvania statute that provides as follows:

> Payment of any tax or income to any **State other than Pennsylvania** or any political subdivision located outside the boundaries of this Commonwealth, by residents of a political subdivision located in Pennsylvania **shall**, . . . be credited to and allowed as a deduction. . . . (Emphasis added.)

Whatever the bases of each court's decision, it is now clear that the Constitution prevents a state from enacting tax statutes which discriminate against nonresidents in favor of residents of the taxing state.

The reciprocal credit provisions contained in the Local Tax Enabling Act of 1965, December 31, P. L.

1257, Section 511 as amended, pose two questions of constitutional proportion.

> (1) Is it permissible to discriminate between nonresidents and provide for the credit to depend upon whether the state of the nonresidents' abode has reciprocal legislation?[9]
>
> (2) Is it reasonable discrimination between resident and nonresident income taxpayers to grant the former a mandatory credit for income taxes paid in other states on income derived from sources either inside or outside the taxing state when included in the residents' gross income without making the same mandatory provision for a credit to the nonresident who is required to pay income tax in the state of residence upon the very income which is being taxed in the state of its source.[10]

As to the first question, it is urged that a classification of nonresidents based upon the existence or nonexistence of a reciprocal statute in the state of their residence is unreasonable and does not afford equal protection. A similar reciprocal provision of this type was in the New York statute which was condemned in **Travis v. Yale and Towne Mfg. Co.**, 252 U.S. 60, 79-80,

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9. There is an additional discriminatory feature regarding the credit provision "among" nonresidents and "between" residents and nonresidents that violates either the privileges and immunities provision or the equal protection clause of the United States Constitution and the uniformity requirement of the Pennsylvania Constitution. The statute places the granting of the credit to nonresidents within the discretion of the taxing jurisdiction. This could allow one of two nonresidents from the same state to receive a tax credit while it was denied to the other merely because they worked in different political subdivisions within the Commonwealth of Pennsylvania.

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10. The specific language of the statute when referring to residents is "shall be credited to and allowed as a deduction" but when describing the credit of nonresidents it states "may at the discretion of the Pennsylvania political subdivision imposing such tax . . . be credited to and allowed as a deduction . . ."

40 S.Ct. 228 (1920) but the Court did not expressly rule upon the validity of the reciprocating provision.[11]

As to the second issue, it is considered that this type of discrimination is without adequate foundation because it is "a general rule, operating to the disadvantage of all nonresidents, and favoring all residents . . . of the taxing states." **Travis v. Yale and Towne Mfg Co., supra,** at Page 81.

Despite its doctrinaire and encyclopedic nature, the **Travis** case is still the leading authority on this general issue. The Supreme Court in this case considered the constitutionality of two provisions of the New York Tax Law. Section 362 exempted from taxation of residents $1,000 if single and $2,000, if married, and $200 for each dependent. A nonresident had no similar provisions. The Court affirmed the holding of the district court[19] that this section violated the privileges and immunities clause. The discrimination against nonresidents was unreasonable and substantial. "Whether they must pay a tax upon the first $1,000 or $2,000 of income, while their associates and competitors who resided in New York do not, makes a substantial difference." Clearly, the purpose of the privilege and immunities clause is as stated by the Court:

> Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly unmistakably secures and protects the right of a citizen of one state to pass into any other state of the union for the purpose of engaging in lawful commerce, trade, or business without molestation; . . . and

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11. However, the Supreme Court of Illinois expressed the view about the Court in **Travis** had declared the New York provision discriminatory and unconstitutional, while holding that a similar provision in the otherwise invalid Illinois income tax law was in contravention of the Fourteenth Amendment. **Bachrach v. Nelson,** 349 Ill. 579, 182 N. E. 909 (1932).

> to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens.

Further, the Court held that there were no reasonable grounds for diversity of treatment and that "this is not a case of occasional or accidental inequality due to circumstances personal to the taxpayers." **Travis, supra.**

Another example of the use of privileges and immunities clause to bar discriminatory state taxes is that which occurred in **Toomer v. Witsell,** 334 U.S. 385, 68 S.Ct. 1156, 9 L.Ed. 1460 (1948). There South Carolina had sought to impose higher taxes on nonresidents who caught shrimp in the South Carolina marginal seas than upon its own residents. As stated by Chief Justice Vinson:

> The primary purpose of (the privileges and immunities Clause of Article IV, Section 2) . . . was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which citizens of State B enjoy.

South Carolina sought to justify the discriminatory tax on the grounds that it was designed to conserve the shrimp fisheries by heading off an impending threat of excessive traveling. The Chief Justice disposed of this contention as follows:

> The argument assumes that any means adopted to attain valid objectives necessarily squares with the privileges and immunities clause. It overlooks the purpose of that clause . . . to outlaw classifications based on the fact of noncitizenships unless there is something to indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed . . .

> We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger represented by noncitizens as a class, and the severe discrimination practiced upon them.

Similarly, in the case titled **Opinion of the Judges,** 140 N.W. 2d 34 S.D. 629 (1966) a question was propounded by the Governor to the justices of the Supreme Court relating to the constitutionality of statute which determined on the basis of residence what persons are qualified to receive a tax credit under the Property Tax Relief Act. The Court was clear in its decision:

> There is no reasonable basis for the discrimination contained in House Bill 707. It is based solely upon residence, and to the extent of the credit or refund it imposes a higher tax upon the citizens of other states than is imposed on our own. Consequently, we are compelled to advise you that the bill in question violates the quoted provisions of the Constitution of the United States and is in our opinions, "clearly unconstitutional." (Emphasis added.)

The Supreme Court of New Mexico adhered to this principle when it declared in **State v. Ashby,** 73 N.M. 387 P. 2d 588 (1963), that New Mexico Income Tax Act providing personal exemptions for residents but not providing the same exemption for nonresidents violated the privileges and immunities clause of the Federal Constitution and the equal protection clause of the Fourteenth Amendment. The Court stated:

> The Travis case held that the denial of exemptions to the nonresident taxpayers of New York while granting exemptions to the resident taxpayers was a crucial discrimination and was not a case of occasional or accidental inequality due to circumstances personal to the taxpayer.

> We see no way to avoid a conclusion under the doctrine of the Travis case . . . that having imposed the tax upon "every resident and nonresident," the failure to extend exemptions granted residents . . . to nonresident taxpayers bring the New Mexico Act into conflict with Article IV, Section 2, of the Constitution of the United States.

It is axiomatic in American jurisprudence that all classifications made by a state are not unconstitutional. Specifically, the equal protection provision and the privilege and immunities clause would allow reasonable discrimination.[12] Neither provision "preclude(s) disparity of treatment in many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them." **Toomer v. Witsell,** 334 U.S. 385, 396, 68 S.Ct. 1156, 1162, 92 L.Ed. 1460, 1471 (1948). A plethora of carefully reasoned cases have found valid reasons for such discrimination.[13]

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12. In regards to reasonableness and classification of taxation, the Fourteenth Amendment to the federal constitution and the Uniformity clause in the Pennsylvania Constitution stands in **pari materia. Commonwealth v. Fireman's Fund Ins. Co.,** 369 Pa. 60, 87 A 2d 255 (1952).

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13. Consistent with the above principle, it has been held that where the classification results into tax equalization or is peculiarly personal to the resident or nonresident there is no constitutional violation. See **Muliens v. Commonwealth of Kentucky,** 309 U. S. 83, 60 S. Ct. 406, 84 L. Ed. 59 (1939) (Discrimination allowed in the case of in-state and out-of-state bank deposits. The treatment accorded two kinds of deposits may have resulted from the difference in the difficulties and expenses of tax collection) **Anderson v. Tieman,** 182 Neb. 393 155 N. W. 2d 322 (1967) (Deductions were allowed for taxes paid in purchasing food for personal use. "Viewed as a form of state sales tax exemption, the classification between residents and nonresidents as to the credit or refund of sales tax on food for personal use is supported by valid independent reasons other than mere residence"); In **Berry v. State Commission,** 241 Ore. 580, 397 P. 2d 780 (1965) (Allowed personal deductions for residents only.

It suffices here, however, to suggest that the reasons in those cases justifying the discriminatory classification cannot be found.

The nonresident miners receive no direct benefits from Perry Township. They do not get the benefits of attending local schools or enjoying the benefits usually available for residents. Additionally, the nonresident is forced to pay income taxes on the same earned income to the State of West Virginia. Yet, if the credit is denied them they are being asked to bear a greater portion of the tax burden than residents of the Commonwealth of Pennsylvania. Accord. **Borden v. Warner Bros. Theatres,** 345 Pa. 270, 27 A 2d 62 (1942), the Supreme Court of Pennsylvania stated that "uniformity of taxation" means equality of tax burden and a tax to be uniform must operate alike on the classes of things or property subject to it. Moreover, there can be no valid justification by discriminating within the class of nonresidents. Certainly whether State A has a reciprocating statute and State B does not can hardly be seen as a valid reason for this discrimination. In this instance, both taxpayers are burdened with the imposition of double taxation, but the nonresident miners from West Virginia cannot get the benefit of the tax credit because West Virginia has no statute allowing credits for income taxes paid to the political subdivisions of Pennsylvania.

". . . Personal deductions are so clearly related to the state of residence that they should be allowed only by the state residence and not by every other state in which some part of a taxpayer's income might be found and taxed.") **Goodwin v. State Tax Commission,** 286 App. Div. 694, 146 N. Y. S. 2d 172 (1955) (Personal deductions allowed. "The face of residence of the taxpayer within the state is thus a legitimate reason for allowing him to make these special deductions.")

Additionally, additional benefits receive from taxation have been recognized as a valid basis for allowing discriminatory tax rates or exemption. **Borden v. Selden,** 259 Ia 808, 146 N. W. 2d 306 (1966).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Counsel for Petitioners

December, 1972

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 71-1846

CONSOLIDATION COAL COMPANY, a corporation

v.

LAWRENCE W. BAILEY, individually and as the representative party of all other persons in the class similarly situated; THE TOWNSHIP OF PERRY, Greene County, Pennsylvania; FLOYD BIRCH, E. D. LEMLEY and L. CARL PHILLIPS, as Supervisors, constituting the Board of Supervisors of said Perry Township; ESTELLA JOHN as Occupational Privilege Tax Collector of said Perry Township; and DON WILKINSON as Earned Income Tax Collector for said Perry Township,

LAWRENCE W. BAILEY, individually and as the representative party of all other persons in the class similarly situated, Appellant

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(D. C. Civil Action No. 70-1144)

Appeal From the United States District Court
For the Western District of Pennsylvania

Argued September 14, 1972
Before McLaughlin, Adams and Gibbons,
Circuit Judges

OPINION OF THE COURT

(Filed September 27, 1972)

Per Curiam:

Appellant Bailey, a class action defendant in an interpleader action, appeals the determination by the district court that the Township of Perry, Pennsylvania, the adverse claimant to the interpleaded fund, was entitled thereto. The fund consists of monies withheld from wages earned by the class members from Consolidation Coal Company, the plaintiff in interpleader.[1] The wages were withheld pursuant to tax ordinances passed by the Township of Perry on the authority of the Local Tax Enabling Act of 1965, 53 Pa. Stat. Ann. §6901 et seq. (Supp. 1972). One ordinance levied a one per cent tax on the income of nonresidents earned for services rendered in the Township. The other levied an occupational privilege tax of $10 per person on all persons, resident and nonresident, laboring in Perry. Pursuant to the ordinances the taxes were withheld by Consolidation. The amounts withheld are claimed both by the Township and by the wage earners.

Consolidation, a Delaware corporation, operates the Humphrey mine, which was originally opened in West Virginia, but which was eventually extended, underground, across the state line into Perry Township, Pennsylvania. The mine has ventilator shafts, a portal, a washhouse, and a parking lot in Perry Township, but all coal mined in Pennsylvania is removed underground to West Virginia where it is processed for sale. The appellant and the class he represents are West Virginia residents who work in the Humphrey mine. They enter

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1. The matter was before this court previously on the issue of jurisdiction under 28 U. S. C. §1355, **Consolidation Coal Company v. Bailey**, Nos. 71-1193, 71-1304 (3d Cir., filed June 8, 1971).

the mine through the portal in Perry and work underground extracting coal entirely within that Township. West Virginia and Pennsylvania have an informal agreement with respect to mines extending across the state line that the state in which the mine was first opened shall have jurisdiction over the entire mine with respect to mine safety regulations.

The nonresident miners claim that as a matter of due process of law Pennsylvania lacks jurisdiction to tax and that the tax is on interstate coal mining in violation of the commerce clause. The district court rejected these contentions. We affirm.

A state can tax income produced within its borders, and can tax the income of nonresidents from occupations carried on within its borders. **International Harvester Co. v. Wisconsin,** 322 U.S. 435 (1944); **Non-Resident Taxpayers Assoc. v. Philadelphia,** 341 F. Supp. 1139 (D.N.J. 1971). The taxing power extends to activities which are in interstate commerce, provided that the state has exerted its power only in proportion to activities within its borders; and as to which activities it has afforded opportunity and protection. **E.g., General Motors v. Washington,** 377 U.S. 436 (1964); **Wisconsin v. J. C. Penney Co.,** 311 U.S. 435 (1940); **Pan American World Airways v. Government of Virgin Islands,** 459 F. 2d 387 (3d Cir. 1972). Clearly here, where the miners work at extracting Pennsylvania coal entirely within the boundaries of Perry Township, Pennsylvania, enter the mine through a portal in that Township, use a Perry Township washhouse, a Perry Township parking lot and Perry Township roads to get to work, there is a sufficient nexus for the imposition of a tax. Appellant relies principally upon the informal understanding between Pennsylvania and West Virginia by which the

latter has mine safety enforcement responsibility. That agreement, however, is an administrative convenience irrelevant to the issue of Pennsylvania's power to tax. There is no contention that the small tax here involved imposes so great a burden on interstate commerce in coal as to amount to a discrimination against such commerce. The commerce clause does not relieve those engaged in interstate commerce from a just share of the state tax burden. **Western Live Stock v. Bureau of Revenue,** 303 U.S. 250, 254 (1938).

Appellants also contend that the Pennsylvania Enabling Act deduction provision, 53 Pa. Stat. Ann. §6914 (Supp. 1972), is violative of the equal protection and privileges and immunities clauses of the United States Constitution because it provides that a Pennsylvania resident receives a credit for out-of-state income taxes he pays, whereas a nonresident is given such credit only if the state where he paid the tax has a reciprocal provision giving Pennsylvania residents a similar credit. This, appellants argue, subjects nonresidents to the risk of multiple taxation from which residents are protected. The risk to which they refer, however, is entirely hypothetical. Political subdivisions of West Virginia do not have the power to enact either a personal income tax or an earned income tax, W. Va. Code Ann., §§11-8-1 et seq., 11-21-1 et seq. (1966); and the state gives nonresidents a credit against the personal income tax it imposes if the nonresident's home state has reciprocal provisions, §11-21-40, thereby meeting the Pennsylvania requirements for statutory credit. Since the class of miners before us has not been subjected to any discrimination we see no justiciable issue as to the effect of the Pennsylvania reciprocity provision.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 71-1846

CONSOLIDATION COAL COMPANY, a corporation

vs.

LAWRENCE W. BAILEY, individually and as the representative party of all other persons in the class similarly situated; THE TOWNSHIP OF PERRY, Greene County, Pennsylvania; FLOYD BIRCH, E. D. LEMLEY and L. CARL PHILLIPS, as Supervisors, constituting the Board of Supervisors of said Perry Township; ESTELLA JOHN as Occupational Privilege Tax Collector of said Perry Township; and DON WILKINSON as Earned Income Tax Collector for said Perry Township

LAWRENCE W. BAILEY, individually and as the representative party of all other persons similarly situated, Appellant

---

(D.C. Civil Action No. 70-1144)

On Appeal From the United States District Court
For the Western District of Pennsylvania

Present: McLaughlin, Adams and Gibbons, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed August 11, 1971, be, and the same is hereby affirmed, with costs taxed against appellant.

Attest:

THOMAS F. QUINN,
Clerk

September 27, 1972